147 U. S. 692

RECORD, CASE NO. 14823.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO., 900.

THE UNITED STATES, APPELLANT,

vs.

STEPHEN C. McCANDLESS.

APPEAL FROM THE COURT OF CLAIMS.

FILED AUGUST 26, 1891.

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1 IN THE COURT OF CLAIMS.

STEPHEN C. McCANDLESS
vs.
THE UNITED STATES. } No. 16033.

I.—*Petition filed March 23, 1888.*

To the honorable judges of the Court of Claims:

Your petitioner, Stephen C. McCandless, a citizen of the United States, and a resident of Pittsburg, in the State of Pennsylvania, respectfully shows:

That from the 1st day of April, 1886, to the 31st day of December, 1887, he was clerk of the United States district courts for the western district of Pennsylvania, duly qualified, and acted as said clerk.

That your petitioner presented to the accounting officers of the Treasury for payment his accounts for services as said clerk from the 1st day of April, 1886, to the 31 day of December, 1887, sworn to and duly approved by the court, as required by the act of February 22, 1875, 18 Stat.
2 L., 333; that in the settlement of said accounts the accounting officers disallowed and refused payment of fees for the following services, as per Exhibit "A," herewith attached.

Petitioner claims that in accordance with the provisions of section 828 of the Revised Statutes of the United States, he is entitled to be paid by the United States for each of the services performed by him as aforesaid, and approved and allowed by the court, and though his accounts therefor have been duly presented to the accounting officers of the Treasury for payment of said fees, and, although payment of the same has been repeatedly demanded, yet no part of the same has been paid to him, nor to anyone for him, nor has any part of the same been allowed to him in any way, as a credit or set-off by any officer or Department of the United States; but, on the contrary, allowance and payment thereof has been refused, although his accounts therefor were duly presented to and approved by said court, in accordance with law.

Your petitioner further avers that no assignment or transfer of said claim, or any part thereof, has been made by him, and that he is the lawful owner thereof; that his whole compensation, if said fees were added, would not exceed the maximum compensation of $3,500 for any one year.

Wherefore, your petitioner prays judgment against the defendant for $171.15, with interest and costs.

STEPHEN C. McCANDLESS.

By his attorney:

C. C. LANCASTER,
Washington, D. C.

3 *Exhibit A.*

The United States of America, Dr., to Stephen C. McCandless, clerk, United States district court for the Western District of Pennsylvania, for services on behalf of the United States, disallowed by the accounting officers of the Treasury, per reports 98041, 99675, 100855, 102455, 103959, 105055, 106621:

1st.	Sixteen days' attendance on court when in session, at five dollars per day, not allowed because same days were charged and allowed in his accounts as a commissioner of the circuit court "for hearing and deciding on criminal charges"	$80.00
2d.	Docket fees in cases where grand jury return "not true bill," one dollar each	6.00
3d.	Docket fees in cases where trial was had, verdict and sentence, or jury failed to agree	13.00
4th.	Miscellaneous fees, entering orders of court, making copies, certificates, and seals	28.25
5th.	Swearing witnesses in cases on trial, at 10 cents each	9.60
6th.	Issuing commitments to jail, in addition to copy of order of removal	22.00
7th.	Entering orders of court approving accounts of marshal, district attorney, and commissioners, and copies with certificates and seals	11.40
8th.	Filing papers from U. S. commissioners in cases heard by them	.90
	Total	$171.15

4 DISTRICT OF COLUMBIA,
County of Washington, ss:

Before me, A. S. Taylor, a notary public in and for the District of Columbia, personally appeared Charles C. Lancaster, who, being duly sworn, deposes and says that he is the attorney for the petitioner named in the foregoing petition, and that he is authorized by warrant of attorney duly executed by said petitioner and filed herewith to verify said petition; and petitioner is justly entitled to the amount therein claimed from the United States, after allowing all just credits and set-offs, and that the facts therein stated are true to the best of his knowledge and belief.

CHARLES C. LANCASTER.

Subscribed and sworn to before me this 23rd day of March, 1888.

A. S. TAYLOR,
Notary Public.

5 II.—*Traverse filed March 23, 1888.*

And now comes the Attorney-General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations and asks judgment accordingly.

JOHN B. COTTON,
Assistant Attorney-General.

6 III.—*Findings of fact and conclusion of law, filed May 25, 1891.*

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

1st. That claimant was clerk of the United States district court for the western district of Pennsylvania from the first day of April, 1886, to the thirty-first day of December, 1887.

2nd. That claimant's accounts for services as said clerk, verified by his oath, were presented to the court in the presence of the district attorney, and an order approving the same as being just and according to law was duly entered of record.

3d. The accounts thus approved were presented for payment to the accounting officers of the Treasury, and they refused payment for the following services, as charged by said clerk, to wit:

1. Sixteen days' attendance on court when in session, at $5 per day, not allowed because same days were charged and allowed in his accounts as a commissioner of the circuit court "for hearing and deciding on criminal charges"	$80.00
2. Docket fees in cases where grand jury return "not true bill," $1 each	6.00
3. Docket fees in cases where trial was had, verdict and sentence, or jury failed to agree	13.00
4. Miscellaneous fees, entering orders of court, making copies, certificates, and seals	28.25
5. Swearing witnesses in cases on trial, at 10 cents each	9.60
6. Issuing commitments to jail in addition to copy of order of removal	22.00
7] 7. Entering orders of court approving accounts of marshal, district attorney, and commissioners, and copies, with certificates and seals	11.40
8. Filing papers from U. S. commissioners in cases heard by them	.90

CONCLUSION OF LAW.

Upon the forgoing findings of fact the court decides as a conclusion of law that the claimant is entitled to recover the last seven items of his claim, amounting to $91.15, and a majority of the court decides that he is also entitled to recover the first item of his claim, $80. Judgment will be entered in his favor for one hundred and seventy one dollars and fifteen cents ($171.15).

BY THE COURT.

(The court filed no opinion in this case.)

8 IV.—*Judgment of the court.*

STEPHEN C. McCANDLESS
vs. } 16033.
THE UNITED STATES.

At a Court of Claims held in the city of Washington on the 25th day of May, A. D. 1891, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said claimant, Stephen C. McCandless, do have and recover of and from the United States the sum of one hundred and seventy one dollars and fifteen cents.

BY THE COURT.

9 V.—*Application for and allowance of appeal.*

STEPHEN C. McCANDLESS
vs.
THE UNITED STATES. } No. 16033.

From the judgment rendered in the above-entitled cause on the 25th day of May, 1891, in favor of claimant, the defendants, by their Attorney-General, on the 8th day of August, 1891, make application for and give notice of an appeal to the Supreme Court of the United States.

JOHN B. COTTON,
Assistant Attorney-General.

Filed and allowed Aug. 8, 1891, in vacation.

WILLIAM A. RICHARDSON,
Chief Justice.

10 IN THE COURT OF CLAIMS.

STEPHEN C. McCANDLESS
vs.
THE UNITED STATES. } No. 16033.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the judgment of the court, of the application of defendants for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Washington, this 15th day of August, 1891.

[SEAL.]

JOHN RANDOLPH,
Assist. Clerk Court of Claims.

(Indorsed on cover:) Court of Claims. No. 900. The United States, appellant, vs. Stephen C. McCandless. Filed August 26, 1891. Supreme Court U. S., clerk's office. Received Aug. 26, 1891.

147 U.S. 692

Office Supreme Court U. S.
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JAN 7 1893
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

THE UNITED STATES, APPELLANT,
v.
STEPHEN C. McCANDLESS. } No. 900.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

THE UNITED STATES, APPELLANT,
v.
STEPHEN C. MCCANDLESS. } No. 900.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

STATEMENT.

The appellee brought suit against the United States in the Court of Claims for certain fees claimed to be due him as clerk of the district court of the United States for the western district of Pennsylvania, which had been disallowed by the accounting officers of the Treasury, in the adjustment of the accounts rendered therefor, which accounts had been duly approved according to law. The items in suit are set forth in Exhibit A, attached to the

petition, and in the findings of the court. The finding of facts presents the whole case so succinctly that further statement is unnecessary.

ASSIGNMENT OF ERRORS.

1. The court below erred in its conclusion of law on the facts found, that the appellee is entitled to recover for the following items in the findings of fact, viz: Items 1, 2, 3, 4, 6, and 7.

2. The court below erred in ordering, adjudging and decreeing that the appellee should have and recover of and from the United States the sum of $171.15.

ARGUMENT.

We discuss the items in the order of the findings. (R., 3.)

Item 1. A question somewhat similar to the one involved in this item has been submitted to this Court at the present term under Rule 20, in the case of *United States* v. *Marion Erwin*, No. 1194. The question here is, can a clerk of a court be entitled to a per diem fee of $5 for attendance at a session of a district or circuit court when he has been paid a per diem fee of $5 for the same day as a commissioner of the circuit court for hearing and deciding on criminal charges as such commissioner?

In *Erwin* v. *United States* (37 Fed. Rep., 470)—a like case—it was held that the clerk was entitled to the per diem fee for actual attendance at the session of the court. The case was decided on the grounds that both offices were

lawfully held by the same person. Unquestionably it is a general rule of law that the lawful incumbent of two compatible offices is entitled to the emoluments of both offices. But does not the case at bar present an exception to the rule? Section 831 of the Revised Statutes conveys an intention as to duplicate per diems in respect to compatible offices of a much higher degree than those of a clerk of a district court and a United States commissioner, to wit, the offices of clerk of the circuit court and clerk of the district court, both of which may be held by the same person; but, while the statute allows the full compensation of both offices to the same incumbent, it expressly limits him to one per diem fee when he attends a session of each court on the same day, and it also expressly disallows the per diem on rule days. The latter exception makes the intention of the law all the more clear, to restrict the clerks of courts to one per diem only. The limitation as to the two more important offices of clerk would seem to apply to the inferior office of commissioner, by necessary implication, from the rule as to *ejusdem generis*.

While taking this position we grant that the maxim *expressio unius est exclusio alterius* may perhaps control. Nevertheless as such items are disallowed by the accounting officers of the Treasury Department notwithstanding the decision in the *Erwin Case* (37 Fed. Rep.) we take exception to this item in order that the question may be set at rest.

Item 2. This is a charge for "docket fees" which we understand to mean the fees "for making dockets and

indexes," etc. (Rev. Stat., 828.) We understand from the brief of appellee that this item is not now claimed. (*United States* v. *Van Duzee*, 140 U. S., 169.) This item must of course be disallowed, as there was no "cause"—the grand jury having ignored the bills.

Item 3. We except to a part only of this item, namely, to the charge of a "docket fee," in cases where the jury failed to agree. We can not separate the charges of this item, as the findings give the gross sum only.

The grounds of exception are these:

There are three provisions as to docket fees. One allows a fee of $3, the second a fee of $2, and the third a fee of $1. In all of these cases it is contemplated that the causes are finally disposed of. This result is implied in the words "taxing costs, and all other services in a cause," which are found in each of the three provisions. It does not appear that the cases in which the jury failed to agree reached that stage where costs are usually taxed, or where the causes were finally disposed of by the court that tried them.

Item 4. This item is for "miscellaneous fees." Those for entering the orders of court are no doubt legal fees, so possibly may be the others, but we submit that a finding for "making copies, certificates, and seals" is not sufficient to support a conclusion of law that the United States are liable to pay the clerk for that service. To sustain such a conclusion the record should show what the copies and certificates were and the use made of the seal. The approval of the clerk's accounts under the act of February 22, 1875, chap. 95 (18 Stat. L., 333), is only *prima facia* proof that the service was performed and not that the United

States were liable to pay for the service. The seals and certificates may have been attached to copies of subpœnas issued on the precipe of the attorney of either party for aught we know.

Item 6. This item is for issuing commitments to jail in addition to copy of order of removal. The exception to this charge is that section 1030 of the Revised Statutes says:

> No writ is necessary to bring into court any prisoner or person in custody, or for remanding him from the court into custody, but the same shall be done on the order of the court or district attorney, for which no fees shall be charged by the clerk or marshal.

While it might be urged for appellee that this section relates to cases when the person is in the custody of the marshal, it may be answered that while sections 1028 and 5536 to 5538 of the Revised Statutes recognize commitments of prisoners, it is submitted that the specific provision of section 1030 controls at least so far as to prohibit fees to the clerk and marshal in such cases; or at most, by construction *in pari materia*, that the marshal only shall have a fee of 50 cents for the *act* of committing a prisoner to jail, as provided in clause 19 of section 829. The prohibition of section 1030 is against *writs* of commitment, and the charge in this item is for issuing such writs. The intention of the law is not to be avoided by fine distinctions. On the other hand it is proper to refer to the case of *United States* v. *Taylor*, No. 795, pending on apppeal in this court which has been submitted under Rule 20, wherein the opinion of Jackson, J., strongly sustains the charge for a similar fee.

Item 7. This item is for *fees* for entering orders of court approving the accounts of marshal, district attorney and commissioners, and for copies (of the orders, we presume) with certificate and seal (on the copies, we presume). It is not shown whether the copies were single, duplicates, or triplicates. This item is excepted to on the grounds stated in the brief for appellants in the case of *United States* v. *Richard Jones*, No. 312, now pending in this court, and submitted under Rule 20.

Respectfully submitted.

FELIX BRANNIGAN,
Assistant Attorney.

CHARLES H. ALDRICH,
Solicitor-General.

147 U.S. 802

Office Supreme Court U. S.
FILED.
DEC 15 1892
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

THE UNITED STATES, APPELLANT,
vs.
STEPHEN C. McCANDLESS, APPELLEE. } No. 900.

Appeal from the Court of Claims.

BRIEF FOR APPELLEE.

CHARLES C. LANCASTER,
Counsel for Appellee.

MITCHELL, PRINTER.

IN THE

Supreme Court of the United States.

October Term, 1892.

THE UNITED STATES, Appellant,
vs.
STEPHEN C. McCANDLESS, Appellee. } No. 900.

Appeal from the Court of Claims.

FEES OF CLERK UNITED STATES COURT.

BRIEF FOR APPELLEE.

It is contended on behalf of the appellee that all the items of charges included in the judgment of the court below are clearly authorized by the provisions of section 828, Revised Statutes of the United States, with the exception of item 2.

Item 1. Sixteen days' attendance on court when in session, at $5.00 per day, not allowed because same days were charged and allowed in his accounts as a commissioner of the circuit court "for hearing and deciding on criminal charges." The offices of clerk and commissioner are compatible. A person who holds two distinct compatible offices may receive the compensation of each. A clerk is given a *per diem* fee "for his attendance" at a session of the court; a commissioner is given a *per diem* fee "for hearing and deciding" services clearly distinct. Erwin *vs.* U. S., 37 Fed. Rep., 470. Marvin *vs.* U. S., 44 Fed. Rep., 408; U. S. *vs.* Saunders, 120 U. S., 126.

Item 2 is not claimed on the authority of U. S. *vs.* Van Duzee, 140 U. S., 169.

Items 3, 4, 5, 6, 7 and 8 are claimed on the authority of U. S. *vs.* Van Duzee, *supra*, where similar services were allowed the claimant. The approval of the Court is conclusive in the absence of clear and unequivocal proof of mistake. U. S. *vs.* Jones, 134 U. S., 483.

It is submitted that the appellant has failed to show any mistake in the approval of the Court, and the judgment of the court below should be affirmed with the exception of item 2, abandoned by appellee.

CHARLES C. LANCASTER,
Counsel for Appellee.